MOTION FILED
OCT 23 1980

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC., *Petitioner*,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR MARY P. LAFFEY, *et al.*, AS *AMICI CURIAE*

MICHAEL H. GOTTESMAN*
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amici Curiae

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Mary P. Laffey, *et al.*[1] move for leave to file the attached brief as *amici curiae.*[2]

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[1] The other movants are: Mary Louise Ayres, Diane B. Backovich, Nancy J. Bates, Alta Mae (Smith) Christ, Rhea Dow, Beverly A. Emge, Susan F. Gerde, Mary Patricia Gleason, Dona M. Hall, Viona S. Hamilton, Myrna Lee (Olson) Hedgren, Peggy M. Helme, Judi Neu Jochimsen, Celestine Johnson, Katherine T. Keane, Suzanne P. Kress, Margaret J. Laffey, Abby Lanman, Shirley Linburgh, Barbara E. Manrow, Alice C. McCabe, Patricia McFarland, Mary C. Moxness, Janet M. Pegg, Susan M. Pupera, Carol Raschke, Angelica H. Renner, Virginia (Donohue) Rose, Marygale (Martin) Rosenberg, Rosemary M. Ruff, Mary Ann Schaak, Goldie K. (Chun) Shannon, Georgia Simpson, Iris Smith, Janet Smith, Jemine Smith, Elizabeth Stewart, Gayle Sturgis, and Connie Walker.

[2] Respondents consented to the filing of this brief, but as explained in ¶ 4, *infra*, petitioner refused to consent.

1. Movants are the original 40 plaintiffs in *Laffey, et al.* v. *Northwest Airlines, Inc.*[3] They are also the representatives of the Title VII class certified in *Laffey*.

2. The instant lawsuit involves a quest by Northwest Airlines, the defendant in *Laffey,* for contribution from two unions for part of the backpay assessed against Northwest in *Laffey*. Movants have no stake in the outcome of the instant lawsuit, nor do they wish to state any view on the legal issues before this Court. Rather, movants wish to file the attached brief for a very limited purpose. In its brief to this Court, Northwest purports to recite, as "background," certain of the "findings of the district court" in *Laffey*. (NWA Brief, p. 2 n. 2). Northwest then proceeds for three pages to furnish an inaccurate recitation of the findings in *Laffey*. (*Id.* pp. 3-5). That recitation is wholly irrelevant to the legal issues before this Court. Northwest did not see fit to refer to these findings in its complaint herein (J.A. 15-23), and in any event the findings in *Laffey* would not be binding upon defendants in the instant lawsuit. Were this Court, in its opinion in the instant case, inadvertently to characterize the findings in *Laffey* in the inaccurate fashion proffered by Northwest, that characterization would not, in a legal sense, be "binding" upon movants or upon the lower courts in which aspects of the *Laffey* case are still being litigated. Nevertheless, as a practical matter, a declaration by this Court as to what was "found" in *Laffey* might weigh heavily with the lower courts and thus influence the further prosecu-

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[3] 366 F.Supp. 763 (D.D.C. 1973) and 374 F.Supp. 1382 (D.D.C. 1974), *affirmed in part, vacated in part and remanded,* 567 F.2d 429 (D.C. 1976), *cert. denied* 434 U.S. 1086 (1978).

tion of the *Laffey* case. For this reason, movants have an interest in filing the attached brief.

3. The attached brief makes two points: (1) that there is no occasion for this Court in its opinion herein to characterize the findings in *Laffey,* and accordingly this Court should refrain from doing so; and (2) that, if this Court determines that it *will* characterize the findings in *Laffey*, it should have before it a correct description of those findings (which we furnish) and not an inaccurate description such as appears in Northwest's brief.

4. On October 9, 1980 we wrote to counsel for all parties in the instant case requesting their consent to the filing of this *amici curiae* brief. A copy of this letter is reprinted as Appendix A *infra.* Our letter explained the purpose of our proposed *amici* brief as follows:

> The brief we would file (if we decide to file) would not discuss any of the legal issues before the Court in this case. Rather, its sole function would be to apprise the Court of our disagreement with Northwest's characterization of the findings in *Laffey* and of the evidence which underlies those findings. Our brief would urge the Court to refrain from characterizing the findings and evidence in *Laffey,* and would recite our view respecting the findings and evidence in the event that the Court determines that it *will* refer to them in its opinion.

Counsel for both respondents herein consented. However, by letter of October 14, 1980 (reprinted as Appendix B) counsel for Northwest refused consent, explaining:

> After consideration of the reasons expressed in your letter for the filing of such a brief, it is

Northwest's position that an *amici* brief is neither warranted nor timely and that your proposed brief would not contribute anything to the Court's resolution of the legal issues that are before it in the *Transport Workers Union* case.

5. Movants have no reason to expect that either of the respondents will make the points contained in the attached brief.

6. While the attached brief does not support any party, it could not have been filed within the time allowed for filing petitioner's brief, as contemplated by this Court's rule 36(2), as it was not until the filing of petitioner's brief that the occasion for filing the attached brief (i.e. the need to respond to inaccurate statements in petitioner's brief respecting the *Laffey* findings) arose.

CONCLUSION

WHEREFORE, for the reasons set forth hereinabove, movants request that leave be granted to file the attached brief *amici curiae*.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

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BRIEF FOR MARY P. LAFFEY, *et al.* AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE*

As more fully explained in the motion for leave to file this brief, *amici* are the original plaintiffs and the representatives of the Title VII class in *Laffey* v. *Northwest Airlines, Inc.*, the lawsuit whose backpay award is the occasion for Northwest's quest in the instant suit for contribution from the respondent unions.

Amici have no stake in the outcome of the instant suit, nor in the resolution of the legal issues now before this Court, and they do not desire to state a view on those issues. However, Northwest's brief contains three pages purporting to characterize the findings in *Laffey,* obstensibly "to provide background" (NWA Brief, p. 2 n. 2), and that recitation misstates what was found by the courts in *Laffey. Amici* are concerned that that recitation, if not corrected, might induce this Court in its opinion herein to characterize the *Laffey* findings inaccurately; and, as aspects of the *Laffey* litigation are still ongoing in the lower courts, *amici* fear that such an inaccurate characterization of the *Laffey* findings by this Court might weigh heavily with the lower courts and thus influence the further prosecution of the *Laffey* case. Accordingly, *amici* file this brief (1) to show that there is no occasion for this Court to discuss the *Laffey* findings in its opinion in the instant case, and (2) in the event the Court determines that it *will* discuss those findings in its opinion, to correct Northwest's inaccurate description thereof so that the Court's opinion will not contain such inaccuracies.

ARGUMENT

I. There Is No Occasion for This Court to Discuss or Characterize the *Laffey* Findings in Its Opinion in the Instant Case, and It Should Refrain From Doing So.

The instant case is before this Court on review of rulings on motions to dismiss. The issues which this Court has granted certiorari to decide are pure issues of law, involving the availability *vel non* of contribution under the Equal Pay Act and Title VII, which do not depend in any respect upon the findings which were

made respecting the merits in the *Laffey* case. There is, accordingly, no imperative for this Court, in its opinion in the instant case, to describe the evidentiary findings upon which the courts in *Laffey* based their conclusions that Northwest violated Title VII and the Equal Pay Act. Northwest did not deem those findings pertinent to the complaint which it filed in the instant case (J.A. 15-23), and in refusing consent to the filing of this *amici* brief Northwest's counsel stated that our expressed desire to submit a correct version of the findings in *Laffey* "would not contribute anything to the Court's resolution of the legal issues that are before it in the [instant] case." (See *App.* B., *infra*).

We quite agree with Northwest's counsel that the findings in *Laffey* are not material "to the Court's resolution of the legal issues that are before it in the [instant] case." It is, accordingly, a mystery to us why Northwest saw fit to devote three pages of its brief herein to a purported description of those findings (NWA Br. 3-5). But the fact is that Northwest did so, and that its description misstates what was found by the courts in *Laffey* (see Part II, *infra*). And, whatever may have motivated Northwest, the adoption in this Court's opinion of that inaccurate recitation, while seemingly diminishing Northwest's ultimate chances of securing contribution from the respondent unions,[1] might disadvantage the *Laffey*

[1] If Northwest establishes herein its legal right to pursue a contribution claim against respondent unions, in order to recover ultimately on that claim it will have to prove that those unions violated Title VII and/or the Equal Pay Act. Northwest's depiction of the *Laffey* findings, by incorrectly suggesting that the courts in *Laffey* found substantial differences between the purser and stewardesses positions, might, if embraced by this Court in its opinion, lessen Northwest's chances of prevailing on its claim that those unions violated either statute.

plaintiffs with respect to the resolution of aspects of the *Laffey* case still being litigated in the lower courts (see Motion, *supra,* pp. ii-iii).

Accordingly, we urge this Court to refrain in its opinion herein from describing or characterizing the evidentiary findings in *Laffey,* lest that characterization inadvertently have an effect upon the further litigation in *Laffey* itself. However, on the chance that this Court may decide to describe the *Laffey* findings in its opinion herein, we proceed to correct the inaccuracies in Northwest's recitation of those findings.

II. Northwest's Recitation of the Findings in *Laffey* Is Inaccurate

Northwest's recitation of the findings in *Laffey* suggests that the courts in *Laffey* found: (1) that Northwest regularly employed male flight service attendants (FSA's) at the same rate of pay as stewardesses (NWA Br. 3); (2) that the higher rate for the classification of purser was initially established through collective bargaining (*Id.* 4); (3) that the differential was maintained thereafter because the company and union agreed that the purser classification entailed "extra duties and supervisory responsibilities" not borne by stewardesses (*id.* 3, 4-5); (4) that in fact pursers were assigned such extra duties and supervisory responsibilities (*id.* 3-5); (5) that Northwest stopped limiting the purser classification to men "shortly after Title VII took effect, when a new contract was signed in 1966" (*id.* 3); and (6) that Northwest had behaved entirely reasonably in paying stewardesses less than pursers (*id.* 4). In fact, the *Laffey* courts made none of these findings; indeed, in most instances they made the opposite finding.

1. The district court did *not* find that Northwest regularly employed men as FSA's at the same rate of pay as stewardesses. On the contrary, the court found that Northwest hired male FSA's only to man a particular aircraft—the Boeing Stratocruiser—which was used only from 1949 until 1957 (366 F.Supp. at 766, ¶ 12).[2] Northwest stopped hiring FSA's in 1957, "the discontinued use of the Boeing Stratocruiser having eliminated the Company's interest in having FSA's" (*Id.* at 767, ¶ 17). Thereafter, the incumbent FSA's were promoted to the purser classification as vacancies arose; by 1965, there were only three FSA's left; and by 1970, when the EEOC charges were filed in *Laffey*, there were none (*Id.* at 767, ¶¶ 17, 19). By the latter date, Northwest employed 137 male cabin attendants, all classified and paid as pursers, and 1,747 female cabin attendants, all but one classified and paid as stewardesses (*id.* at 767, ¶ 19). Between 1965 and 1970, Northwest had hired 118 new male cabin attendants, all as pursers, and 2,224 new female cabin attendants, all as stewardesses (*id.* at 767, ¶ 20).

2. The district court did not find, as Northwest asserts in its brief, that the higher pay for pursers was "established" in collective bargaining (NWA Br. 4). The district court found that the purser classification was created in 1947, but was not brought under the collective bargaining agreement until 1949 (*id.* at 766, ¶ 11). As the Court of Appeals in *Laffey* explained,

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[2] These men were promised a right to fill purser vacancies as they arose (*id.* ¶ 14). As one company witness testified: "We do not hire flight service attendants and leave them in limbo without becoming pursers for an indefinite period of time." Appendix in *Laffey* v. *Northwest Airlines, Inc.*, Nos. 74-1791, 75-1334 (C.A. D.C.), p. 836.

when the purser classification was brought under the collective bargaining agreement Northwest "had already created a *status quo* under which pursers were more highly paid than stewardesses" (567 F.2d at 447).

3. The district court in *Laffey* made no finding as to the dynamics which caused continuance of the wage differential thereafter, and most assuredly did not find that "the union demanded continuation of the differential" (NWA Br. 5).[3] The finding to which Northwest cites (366 F.Supp. 767-768, ¶ 23) is that the union rejected Northwest's proposal to reduce the purser salary to the stewardess level; there is no finding, and no evidence in *Laffey,* that the union opposed what the Equal Pay Act required (567 F.2d at 457, n. 189), i.e. raising the stewardesses' salary to the purser level. There is likewise no evidence in the *Laffey* record, and no finding, that the union, either separately or together with Northwest, ever addressed the issue whether a pay differential between pursers and stewardesses was justified by any differences in duties or responsibilities, and Northwest so admitted in a brief to the Court of Appeals in *Laffey.*[4] The lower courts both found

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[3] The respective roles of Northwest and the unions, as they bear upon the reasonableness and good faith of Northwest's behavior, are caught up in the liquidated damages issue in *Laffey,* which remains *sub judice* by virtue of the Court of Appeals' reversal of the district court's initial denial of liquidated damages and remand for reconsideration thereof. 567 F.2d at 463-466.

[4] In its opening brief to the Court of Appeals in *Laffey,* pp. 27, 37, Northwest asserted that the company and the union had "evaluated" the positions and, having "freely agreed that the positions of purser and those of cabin attendants were not substantially identical or equal," established a "bona fide, collectively bargained job evaluation system" paying pursers more than stewardesses. We

that Northwest had continually rebuffed the union's efforts to narrow the wage disparity between stewardesses and pursers (366 F.Supp. at 778, 786, ¶ 45, 70; 567 F.2d at 447), and the Court of Appeals expressly rejected Northwest's argument that in inference could be drawn from the simple fact that "collective bargaining produced unequal rates" (n. 4, *supra*) that the union thought the pursers had duties and/or responsibilities not shared by stewardesses (567 F.2d at 446-447).

4. The district court in *Laffey* found that in fact pursers were *not* assigned extra duties and supervisory responsibilities. With respect to extra duties, the court found that every duty which Northwest contended was uniquely assigned to pursers in fact was assigned to stewardesses as well (366 F.Supp. at 779-785, 786-787, ¶¶ 51-64, 71-73). As for supervisory responsibilities, the district court found that neither pursers nor stewardesses were supervisors, and that the responsibilities which Northwest called "supervisory" were assigned to stewardesses as well as pursers (*id.* at 785-786, ¶¶ 65-69).

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responded that "there is not one word of record evidence indicating Northwest and the union ever compared the duties of the jobs and/or their relative worth, let alone established a job evaluation system"; that "this record does not show any union 'evaluation' of the comparative duties of the job, nor any 'agreement' that their duties warrant different pay." Brief for Plaintiffs, pp. 5, 45. In its reply brief, Northwest conceded this, but argued that the Court could infer these facts from the single fact that "collective bargaining produced unequal rates." Appellant's Combined Reply Brief and Brief on Cross-Appeal, p. 5. The union "must have evaluated the jobs . . . [T]he parties necessarily engaged in a comparison of job values. No evidence suggests the contrary . . . The only possible conclusion is that the parties were engaged in bona fide job evaluation." *Id.*, pp. 5-6.

5. Northwest did *not* stop its discrimination against women in filling purser positions in 1966 "shortly after Title VII took effect" (NWA Br. 3). On the contrary, the district court found—and Northwest did not appeal the finding—a consistent and intentional pattern of discrimination which continued right up to the date of trial denying women access to the higher pay scale enjoyed by the men (366 F.Supp. at 768-773, ¶¶ 24-38). By the time of the district court's decision, in 1973, only one woman had ever become a purser (*id.* at 770-771, ¶¶ 31, 35), and she only because she refused to succumb to Northwest's elaborate efforts to prevent her doing so (*id.* at 769-770, ¶¶ 28-31). And discrimination in filling the purser classification was but one component of a widespread pattern of sex discrimination continuing up to the date of trial found by the district court (*id.* at 773-775, ¶ 39).

6. The implication in Northwest's brief (p. 4) that its paying stewardesses less than men was found somehow "reasonable" (albeit unlawful) by the courts in *Laffey* (NWA Br. 4) is not accurate. As the Court of Appeals recognized, the district court's findings establish that Northwest was motivated by sex in paying stewardesses less than pursers (567 F.2d at 450-451). The passage of the district court's memorandum opinion which Northwest quotes at page 4 of its brief was with respect to an issue on which that court was reversed by the Court of Appeals (567 F.2d at 463-466).[5]

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[5] Northwest speculates in its brief as to why plaintiffs did not name Transport Workers Union as a defendant in *Laffey* (NWA Br. 5). There is nothing in the *Laffey* record to support this speculation, nor did Northwest's complaint in the instant case contain an allegation on this point which must be assumed to be true in the present posture of this case (see J.A. 15-22). It would be as

CONCLUSION

For the reasons set forth above, this Court should not, in its opinion in this case, describe or characterize the findings of the courts in *Laffey*; alternatively, if this Court determines that it will describe or characterize those findings, it should not accept the inaccurate recitation thereof contained in Northwest's brief.

Respectfully submitted,

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG

Bredhoff, Gottesman, Cohen,
Chanin, Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340

Attorneys for Amici Curiae

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inappropriate for us to furnish the reason for plaintiffs not suing TWU as it is for Northwest to speculate thereon. We simply note the Court of Appeals' observation in *Laffey* that "when the union did attempt to win better treatment for stewardesses, it encountered stiff resistance from NWA" (567 F.2d at 447), an observation amply supported by the district court's findings in *Laffey* (366 F.Supp. at 767-768, 778, 786; ¶¶ 22-24, 45, 70).

APPENDIX

APPENDIX A

BREDHOFF, GOTTESMAN, COHEN & WEINBERG

Attorneys and Counselors

1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Area Code 202
833-9340

October 9, 1980

Philip Lacovara, Esquire
Hughes, Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

Steven Moldof, Esquire
Cohen, Weiss & Simon
605 Third Avenue
New York, New York 10016

Asher Schwartz, Esquire
O'Donnell & Schwartz
285 Madison Avenue
New York, New York 10017

Re: *Northwest Airlines* v. *TWU and ALPA*

Gentlemen:

As counsel for the plaintiffs in the *Laffey* case, we are presently considering the possibility of filing an *amicus curiae* brief in the Supreme Court in the above-captioned case. It will probably be several days before we make a final decision as to whether to file the brief, but in order to know whether we would need to accompany such a brief with a motion for leave to file, it is necessary that we ascertain now (even though our decision is not final) whether you will consent to the filing of such a brief.

The brief we would file (if we decide to file) would not discuss any of the legal issues before the Court in this case. Rather, its sole function would be to apprise the Court of our disagreement with Northwest's characterization of the findings in *Laffey* and of the evidence which underlies those findings. Our brief would urge the Court to refrain from characterizing the findings and evidence in *Laffey,* and would recite our view respecting the findings and evidence in the event that the Court determines that it *will* refer to them in its opinion.

It is critical that we know by Tuesday, October 14, whether all parties will consent to the filing of an *amicus* brief, for if even one party will not consent it will be necessary that we prepare and print a motion for leave to file. Accordingly, I would very much appreciate each of you letting me know by Tuesday whether you will consent.

If you *are* willing to consent, I would appreciate your sending a letter to me in the form of the attached.

Many thanks for your cooperation.

Sincerely,

/s/ MICHAEL H. GOTTESMAN
Michael H. Gottesman

[Enclosure not reprinted]

APPENDIX B

Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

TELEPHONE: 202-862-7400
TELEX: 89-2874

October 14, 1980

BY HAND

Michael H. Gottesman, Esquire

Bredhoff, Gottesman, Cohen, Chanin,
Weinberg & Petramalo
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: *Northwest Airlines* v. *TWU and ALPA*
(No. 79-1056)

Dear Mr. Gottesman:

I have your letter of October 9 asking whether Northwest Airlines, as petitioner in the above-captioned case, would consent to your filing of a brief on behalf of the plaintiffs in the *Laffey* case as *amici curiae*. After consideration of the reasons expressed in your letter for the filing of such a brief, it is Northwest's position that an *amici* brief is neither warranted nor timely and that your proposed brief would not contribute anything to the Court's resolution of the legal issues that are before it in the *Transport Workers Union* case.

Accordingly, Northwest does not consent to your filing of such a brief.

Sincerely,

/s /PHILIP A. LACOVARA
Philip A. Lacovara